not corroborated? The position seems unreasonable the moment it is stated. There is no such law. The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be properly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or in Equity."

He further submitted that if the Court sifted the evidence carefully it would come to the conclusion that in fact there was no gift of the land to the plaintiff and that the deceased built the house with his own money and not with the money of the plaintiff, and that therefore the plaintiff had failed to prove his claim.

I agree with Mr. Hatchard that if the plaintiff can show that the deceased gave to him, or intended to give to him, the land during his lifetime and that intention remained with him to his death, then he is entitled to succeed in his claim to have the land and the house which is built on it transferred to him by the present trustees of the deceased's estate. But as to the proof necessary in a case of this kind, Farwell, L.J., said *In re Pink*[4] :—

"Since **Strong** v. **Bird**[1] we must regard the matter in the light given us by that decision. It is plain that a mere intention to give, not carried out during the lifetime, will not do, because that would in effect be to allow a man to dispose after his death of his property by a document not testamentary. It is plain also that a mere intention to give is not enough, because you want an immediate gift. If there is an immediate gift, then the resulting trust for the benefit of the beneficiaries is rebutted."

And in *Jackson v. Rodger*[5] Sir Raymond Evershed, M.R., said in relation to a claim by an Executrix, for a motor car, the property of the testatrix, which she alleged was a gift to her :—

"It is a trite observation, but nevertheless one which must not be forgotten, that a claimant in such a situation has a heavy onus to discharge. He or she must prove the case against his or her testator's estate clearly and convincingly"

and in the same case, Jenkins, L.J., stated :—

"To succeed in this case the plaintiff had to prove that there was on the part of the testatrix a present intention to make an immediate gift to her of the motor car, and that such intention survived until the date of the death of the testatrix."

After considering the authorities and the evidence before me, I have come to the conclusion that the plaintiff has not discharged the onus upon him to prove that there was a valid gift of the land to him by the deceased. The fact that nothing was found in the accounts of the deceased, who was admittedly a very careful man with his accounts, that the money used for the house came from money deposited with him by the plaintiff, and that in 1934 the deceased transferred to him properties bought with the plaintiff's money but omitted to transfer the land and the house, confirm my opinion. With regard to the witnesses Syed Idroos and Mohamed Marican, I consider that their evidence was extremely vague and I am unable to accept it as being sufficient or any corroboration of the plaintiff's claim.

The plaintiff's evidence appeared to me to be unreliable and he was apparently quite ready to make any statement that he thought would further his claim. I refer particularly to his evidence which he afterwards contradicted that the land was bought with his money. I would however say that I think he genuinely has an idea that the land and house should belong to him as he has remained in the house for so long without being charged with rent. That, however, does not in any way further his claim on an issue of this nature where an executor is claiming against his testator's estate; in fact he is in no better position than his younger brother, Syed Mohamed, who has also lived in one house belonging to the deceased, rent free, since he was born.

The plaintiff's claim on the issue will be dismissed.

Claim dismissed.

DESAI & CO. v. CHOP SENG TECK.

[O. C. J. (Knight, J.) August 26, 1952]
[Singapore — Suit No. 926 of 1951]

Sale of Goods — Sale not by sample, warranty or adequate description — Contract — Goods not up to quality — Fair average quality — Refusal to accept goods — Damages — Caveat emptor.

By a contract in writing the defendants agreed to purchase from the plaintiffs 20 tons of "White Melon Seeds — Fair Average Quality". The seeds were to be shipped from Port Sudan and delivery was to be effected at the defendants' store in Singapore. Delivery of the goods at the defendants' store was duly tendered but the defendants refused to accept the goods on the ground that they were of inferior quality. The sale was not by sample and without warranty.

Held: although the seeds in question were slightly inferior to what the trade knew as "White Melon Seeds — Fair Average Quality" their degree of inferiority was not sufficient to entitle the defendants to reject them on the grounds that something other than they had contracted to buy had in fact been supplied. They were in fact "White Melon Seeds — Fair Average Quality" and were reasonably described as such.

Case referred to :—

(1) *Wieler v. Schilizzi* (1856), 17 C.B. 619; 139 E.R. 1219.

ACTION FOR DAMAGES.

Matthews Abraham for the plaintiffs.

Chong Thutt Pitt for the defendants.

Cur. Adv. Vult.

Knight, J. : — In this action the plaintiff firm which deals in agricultural produce, seeks damages in

the sum of $3,696 which is the difference between the price contracted to be paid by the defendant firm for a consignment of White Melon Seeds in August, 1951, and the amount they actually received for the seeds in the open market when the defendant firm, in alleged breach of its contract wrongfully refused to accept the consignment in November, 1951.

The facts present little difficulty. On 24th August, 1951, the defendant firm contracted in writing to purchase 20 tons of White Melon Seeds — fair average quality — at a price of $44 per picul from the plaintiff firm. The seeds which were known to be imported from Port Sudan were to be delivered to the defendant firm in Singapore — and payment was to be made in cash on delivery.

On 30th October, 1951, the managing partner of the plaintiff firm duly delivered 20 tons of seeds to the defendant firm which, however, refused to accept them alleging (according to the manager of the defendant firm — though a different reason is given by the plaintiff's manager) that they were not up to quality as they contained a high percentage of coloured beans which, it is admitted, are of inferior quality to that of the white variety. Samples of the consignment were taken by both parties and when the defendant firm still persisted in its refusal to take delivery the plaintiff firm sold the seeds to a Chinese firm for $33 per picul and now claims damages from the defendant firm for the difference between this latter price and the contract price of $44 per picul.

Mr. Chantilal of the plaintiff firm maintains that the defendant firm refused to accept the seeds merely because the contract was made on a falling market, that the quality of the seeds supplied was "fair average" as it is known to produce merchants in Singapore and that the defendant firm is alleging poor quality merely to enable it to escape a loss which would have resulted because the market price of seeds at that time happened to fall.

This is, of course, just another example of those cases in which goods are sold without sample, warranty or adequate description. According to Mr. Chantilal he did in fact deliver White Melon Seeds FAQ and he goes further by saying that even to-day the seeds which have been exhibited in Court and which are samples of the seeds supplied to the defendant firm are "White Melon Seeds FAQ". Two experienced merchants say that 3% — 5% of coloured seeds are invariably found in "White Melon Seeds" and that according to trade usage such seeds are sold in only two categories — namely "White Melon Seeds" or "Red Melon Seeds". On the other hand, the manager of the defendant firm says that he understands "White Melon Seeds FAQ" to have a no higher content than 1% — 2% of coloured seeds. An appraiser called by him speak of 3% whilst a broker (D.W. 3), who is far more experienced than any other of the witnesses says "I have been a produce broker for the last 14 years and said then (speaking of the time when the seeds were delivered) as I say now 'it (the delivery) is a little bit inferior' ".

This evidence I unhesitatingly accept though I do not overlook the appraiser's evidence as to his count of the coloured seeds on the day of the trial. Much weight, however, cannot be placed on what the appraiser said in this regard, firstly because he did not make the point in his certificate prepared at the time and secondly because it is not impossible that certain of the seeds may have become discoloured through natural processes during the considerable period which has elapsed between the date of the survey and the date of trial of this case.

In short I have no doubt that the seeds when delivered to the defendant firm were slightly inferior to what the trade knew as "White Melon Seeds FAQ" and it remains to be ascertained whether their degree of inferiority entitled the defendant firm to reject them on the grounds that something other than they had contracted to buy had in fact been supplied. In my opinion such a conclusion cannot be reached in this case. From the evidence of several witnesses it is established that during the month of November, 1951, the market price of "White Melon Seeds FAQ" was somewhere between $31.50 and $37 and we know from the contract (Exhibit 4) that during that month the rejected seeds were in fact sold for $33. This price indeed is a little below the then current market price for "White Melon Seeds FAQ" but the difference is very slight. Even to-day, moreover, when the question of subsequent deterioration may have to be considered, the broker said that the seeds exhibited in Court fetch only $2 per picul less than "White Melon Seeds FAQ". *Wieler v. Schilizzi*[1] establishes that articles sold as in the present circumstances must bear a reasonable and fair answer to the description in the contract. As Willes, J., said in that case (page 624):—

> "The Jury have in substance found that the linseed in question was so mixed with seeds of a different and inferior description as to have lost its distinctive character and prevent its passing in the market by the commercial name of Calcutta linseed."

The facts of that case, however, are readily distinguishable from these as within a very few days of their rejection by the defendant firm the seeds in fact were sold in the market as "White Melon Seeds FAQ". In short there is no doubt on the evidence that the seeds in question though slightly inferior to what the trade expects, were "White Melon Seeds FAQ"

and were reasonably described as such. People who buy without sample, warranty or proper description have no one to blame but themselves — *caveat emptor!* There will be judgment for the plaintiff firm for $3,696 and costs.

Judgment for the plaintiffs.

MOHAMED ALI BIN OSMAN v. REGINA.

[A. Cr. J. (Buhagiar, J.) September 14, 1953]

[Penang — Criminal Appeal No. 28 of 1953]

Vagrancy Ordinance, 1939, s. 3(1) — Selling cinema tickets without a licence outside booking office — "Hawker" — Definition of.

The appellant was convicted and sentenced on a charge of hawking under section 3(1) of the Vagrancy Ordinance, 1939. The evidence for the prosecution showed that appellant was selling cinema tickets outside the first class booking office of the Windsor Theatre, Penang. One of the grounds of appeal was that the facts as alleged against the appellant did not constitute the offence in the charge. Section 3(1) of the Vagrancy Ordinance reads as follows: "Every hawker wandering abroad and trading without being duly licensed or otherwise authorised by law;.....shall be deemed to be an idle and disorderly person within the meaning of this Ordinance and shall be liable, etc....."

Held: Section 3(1) of the Vagrancy Ordinance, 1939, did not cover the facts as alleged against the appellant.

The legislature did not intend to make, or had in fact made any change by using the word "hawker" in section 3(1) of the Vagrancy Ordinance, 1939, instead of the words "petty chapman or pedlar" used in the Imperial Vagrancy Act, and.....that provision was not intended to apply and does not apply to any person who does a single act of street trading; it does not apply to any person who hawks goods without a licence; it applies to persons who are hawkers i.e. persons carrying their goods from town to town, from house to house or from place to place and who offer their goods for sale without a licence or other authority.

Cases referred to:—

(1) *Druce v. Gabb* (1858) 31 L.T.O.S. 98; 37 E. & E. Digest 361 para 1630.

(2) *Morrill v. State* 38 Wis. 437.

(3) *R. (Best) v. Veniot* (1939), 14 M.P.R. 27.

(4) *Nicholson v. Olds* (1891), 9 N.Z.L.R. 308.

(5) *Mathers v. Penfold* (1915) 1 K.B. 514.

(6) *Pointon v. Hill* (1884) 2 Q.B.D. 306.

CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

J. D. Peterkin (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Buhagiar, J.: — This is an appeal against conviction and sentence imposed by the learned Magistrate at George Town, Penang. The charge against the appellant was as follows:—

"That you on 29.7.53 at 8.20 p.m. at the Windsor Theatre, Maxwell Road, Penang did hawk cinema tickets without a licence outside the booking office of the said theatre and that you have thereby committed an offence under section 3(1) of the Vagrancy Ordinance 37/39."

The evidence for the prosecution shows that the appellant was selling cinema tickets outside the first class booking office of the Windsor Theatre, Penang. One of the grounds of appeal is that the facts as alleged against the appellant do not constitute the offence in the charge.

Section 3(1) of the Vagrancy Ordinance, 1939 (S.S. No. 37 of 1939) runs as follows:—

"3(1). Every hawker wandering abroad and trading without being duly licensed or otherwise authorised by law;

shall be deemed to be an idle and disorderly person within the meaning of this Ordinance and shall be liable, etc."

Counsel for the appellant submitted that to substantiate the charge the prosecution had to prove:—

(a) that the appellant was a hawker;

(b) that the appellant was wandering abroad;

(c) that he was trading; and

(d) that a licence was necessary to sell cinema tickets.

The source of the abovementioned provision is to be found in section 3 of the Imperial Vagrancy Act, 1824, under which "every petty chapman or pedlar wandering abroad, and trading without being duly licensed or otherwise authorised by law" is deemed to be an idle and disorderly person. As the short title indicates and as the context of the whole Act shows, that Act is intended to apply to "vagrants". *Blackstone*, writing of vagrants (4 Bl. Com. 170), calls them idle persons and vagabonds, and says that ancient statutes described them as being "such as wake on the night and sleep on the day, and haunt customable taverns and alehouses, and routs about; and no man wot from whence they come, ne whither they go."

"Petty Chapman" and "pedlar" are not defined; it is clear from the context and from the general meaning of the word "pedlar", and all English cases on the point clearly indicate, that section 3 of the Vagrancy Act does not apply to persons occupying a stationary position in the street to sell their goods and not going either from house to house or from town to town — see *Druce v. Gabb*[1]:—

"A man who hawks about goods from house to house and barters them for other goods, though he takes no payment in money, is, if he has no licence as a hawker, under 50 Geo. 3, c.41, section 6, a petty chapman or a pedlar under the Vagrancy Act, 1824 (c.83) section 3 and is liable to be convicted as a vagrant under the Vagrancy Act, 1824, (c.83) section 3."

"Hawker" is not defined in the Vagrancy Ordinance, 1939, but for the purposes of this Ordinance, I do not consider that there is any fundamental